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No. 83-6766

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOE HAYES, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 21, 1984.
CERTIORARI GRANTED OCTOBER 1, 1984.

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RELEVANT DOCKET ENTRIES

1. Joe Hayes was charged by information in the Circuit Court, Charlotte County, Florida, with burglary and sexual battery July 15, 1980. (R1-2)

2. Hayes moved to dismiss the information and to suppress fingerprint evidence September 24, 1980. (R25-27)

3. The motion to dismiss/suppress was denied October 20, 1980. (R116-144)

4. Hayes was tried on one count each, burglary and sexual battery, July 8-10, 1981, and a verdict of guilty was entered July 10, 1981. (R56-57, 273-742)

5. Sentence of 99 years in state prison was imposed October 5, 1981. (R62)

6. Second District Court of Appeal affirmed the judgment and sentence on September 16, 1983, and denied rehearing on November 2, 1983. *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983).

7. Florida Supreme Court denied petition for discretionary review March 22, 1984. 447 So.2d 886 (Fla. 1984).

8. The United States Supreme Court granted Hayes' Motion for Leave to Proceed *in forma pauperis* and Petition for Writ of Certiorari October 1, 1984.

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA
For Charlotte County,
in the year of our Lord
One Thousand Nine Hundred and Eighty

80-156-CF-A-RMS

Information For
Count I, III, V: Burglary of dwelling
Count II, IV, VI: Sexual battery
Statute: 810.02, 794.011(5)

STATE OF FLORIDA

v.

JOE HAYES

In the name and by Authority of the State of Florida:

EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, prosecuting for the State of Florida, in the County of Charlotte under oath information makes that JOE HAYES late of the County and State aforesaid, on the "SEE BELOW" day of "SEE BELOW" in the year of our Lord One Thousand Nine Hundred and Eighty, in the county and state aforesaid

COUNT I: did on April 27, 1980, unlawfully enter or remain in a certain dwelling, located at 401 SHREVE STREET, Punta Gorda, in the County and State aforesaid, the property of VELORA DAVIS, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by VELORA DAVIS, a human being, and said JOE HAYES did make an assault upon VELORA DAVIS, in violation of F.S. 810.02(1)(2)(A);

COUNT II: did on April 27, 1980, unlawfully commit a sexual battery upon VELORA DAVIS, 82 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT III: did on May 13, 1980, unlawfully enter or remain in a certain dwelling, located at 401 W. RETTA ESPLANADE, Punta Gorda, in the County and State aforesaid, the property of JULIANNE HOLLANDER, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by JULIANNE HOLLANDER, a human being, and said JOE HAYES did make an assault upon JULIANNE HOLLANDER, in violation of F.S. 810.02(1)(2)(a);

COUNT IV: did on May 13, 1980, unlawfully commit a sexual battery upon JULIANNE HOLLANDER, 50 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT V: did on May 18, 1980, unlawfully enter or remain in a certain dwelling, located at 140 CIRCLE DRIVE, MUNICIPAL MOBILE HOME PARK, Punta Gorda, in the County and State aforesaid, the property of HELEN SMITH, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by HELEN SMITH, a human being, and said JOE HAYES did make an assault upon HELEN SMITH, in violation of F.S. 810.02(1)(2)(a);

COUNT VI: did on May 18, 1980, unlawfully commit a sexual battery upon HELEN SMITH, 60 years of age, without said victim's consent, by vaginal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious injury, in violation of F.S. 794.011(5);

Contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

/s/ _____

Assistant State Attorney,
Twentieth Judicial Circuit
State of Florida

State of Florida
County of CHARLOTTE

Personally appeared before me, EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, who being duly sworn, says that he files this information in good faith and certifies that he has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the information, if true, would constitute the offense therein charged.

Sworn to and subscribed before me this 15th day of July, A.D. 1980

/s/ _____

SUZANNE ATKINS
Notary Public, State of Florida at Large
My Commission Expires May 31, 1983
Bonded by American Fire & Casually Company

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No. 80-156-CF-A-RMS

STATE OF FLORIDA, PLAINTIFF,

v.

JOSEPH HAYES, DEFENDANT.

MOTION TO DISMISS INFORMATION AND TO DISCHARGE DEFENDANT AND/OR TO SUPPRESS EVIDENCE

COMES NOW JOSEPH HAYES, by his Court appointed lawyer, ROBERT "BOB" BADER, and pursuant to the applicable provisions of F.R.Cr.P. 3.190, moves to dismiss the Information, and/or suppress evidence, and in support thereof says:

1. That the arrest of JOSEPH HAYES on June 23rd, 1980, was without probable cause; in that, at the time of the defendant's arrest, there was insufficient evidence to identify the defendant as the perpetrator of any of the charges in this Information.

2. The facts in support of this contention are as follows:

a. There had been no positive identification of this defendant by any of the alleged victims.

b. The police relied upon information from a "confidential informant", who did not identify this defendant as being in any of the subject homes, or committing the act, but who allegedly identified the defendant as being in the area.

c. Said confidential informant is unreliable, and the testimony given does not meet any of the requirements for a confidential informant. (See Spanelli vs. United States, 393 U.S. 410) and (State vs. Wolfe, 310 S. 2nd, 729).

3. The evidence obtained from the defendant was in violation of his constitutional rights under the 4th, 5th, 6th, and 14th Amendments of the U.S. Constitution.

WHEREFORE, JOSEPH HAYES, by his Court appointed lawyer, moves to suppress the following evidence:

a. All fingerprints taken from the defendant.

b. All photographs taken of the defendant used in a "purported" photo lineup.

c. One pair of tennis shoes taken from the premises of the defendant, without a search warrant.

4. In support of this motion, this defendant says that at the time that he was taken into custody by the officers of the Punta Gorda Police Department, there was insufficient evidence to identify him as the defendant in this case, notwithstanding the suspicions of the police officers.

5. The only creditable identification which the authorities have was obtained after his illegal detention, by compelling him to submit to fingerprints, and verifying those fingerprints with alleged latent fingerprints taken at the scene of the crime and confirming their similarity. Then, and only then, did the State formally inform the defendant of his Miranda rights and charge him with the crimes set forth in this Information.

6. The facts and circumstances leading to this event are more fully set forth herein:

a. On the evening of June 23rd, 1980, without probable cause, three officers of the Punta Gorda Police Department went to the residence of the defendant, and asked him to "voluntarily" come down to the Police Station for the purpose of having his fingerprints taken, as they were (sic) investigating alleged "burglaries" in the city. When the defendant refused to voluntarily come, the officers advised the defendant that they had the authority to arrest him then and there on the crime of burglary; but if he would voluntarily come to the Police Station, they would not do so.

b. Acting in fear of his arrest, and in reliance upon the threat and the power and authority to arrest him, JOSEPH HAYES accompanied the officers in a police car to the Punta Gorda Police Station.

c. By pre-arrangement, the police officers had a Deputy Sheriff and presumed fingerprint expert available, and upon arriving at the Police Station, proceeded to finger-

print and photograph the defendant, holding him in a back room; whereupon the fingerprints thus obtained, were compared with purported latent fingerprints taken at the scene of the crime, and were identified as being the same as JOSEPH HAYES by the Deputy Sheriff.

d. Then, and only then, did the Police Officers inform the defendant he was under arrest, and inform him of his Miranda rights, including his right to counsel.

WHEREFORE, as a consequence of the illegal detention and the improper methods used in obtaining evidence against the defendant, JOSEPH HAYES, by his Court appointed attorney, moves for an Order dismissing the Information, suppressing all of the above stated evidence, and discharging the defendant, and ordering his immediate release from custody.

The undersigned makes the preceding motion under oath, and swears that the facts alleged herein are true and correct to the best of his knowledge, and are predicated upon the sworn depositions of the arresting officers, which have or will be filed herein, and requests an evidentiary hearing on this motion.

I HEREBY CERTIFY that a copy of the foregoing Motion has been hand delivered to the Assistant State Attorney, Charlotte County Courthouse, Punta Gorda, Florida, 33950, this 24th day of September, 1980.

/S/ _____

ROBERT "BOB" BADER,
Attorney for Defendant,
P.O. Box 267,
Punta Gorda, Florida, 33950,
(813) 625-4180.

STATE OF FLORIDA
COUNTY OF CHARLOTTE

BEFORE ME, the undersigned authority, appeared ROBERT "BOB" BADER, the Court appointed defense lawyer for JOSEPH HAYES, and states that the above facts and information are true and correct.

/s/ _____
SHARON K. RADFORD
Notary Public

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires Sept. 17, 1983
Bonded by American Fire & Casualty Company

[R 116] IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CRIMINAL ACTION

Case No. 80-156 CF

STATE OF FLORIDA, PLAINTIFF

v.

JOSEPH HAYES, DEFENDANT

MOTION TO DISMISS

Proceedings had and testimony taken in the above entitled cause before the Honorable RICHARD M. STANLEY, *Circuit Judge*, on Monday, October 20th, 1980.

APPEARANCES:

EUGENE BERRY, Esquire,
Assistant State Attorney,
Charlotte County Courthouse,
Punta Gorda, Florida 33950;
representing the Plaintiff.

ROBERT BADER, Esquire,
Post Office Box 267,
Punta Gorda, Florida 33950;
representing the Defendant.

[R117] MR. BADER: I would like to call—

MR. BERRY: Before we call any witnesses I would like to address the Court.

THE COURT: Let me get a Clerk so I know what we are talking about.

MR. BADER: Judge, the motion was filed back on the 24th of September and it's three (3) pages, a motion to dismiss or suppress evidence.

THE COURT: When was it filed?

MR. BADER: The 24th, Judge, it may have been stamped the 25th. I have it certified as the 24th.

THE COURT: Motion to dismiss information and to discharge and suppress evidence.

MR. BERRY: Your Honor, I would like to address the Court on the motion itself.

THE COURT: Yes.

MR. BERRY: Your Honor, from reading his motion it appears this motion is one, a motion to, standard motion to dismiss, also possible a C-4 motion to dismiss, also possible a motion to suppress, also possible a writ of habeas corpus. Your Honor, I think the motion is totally confusing, totally inappropriate. I don't think it puts me adequately on notice of what I'm here for today. Are we here for a suppression hearing? Are we here for a hearing on the prima facia evidence in regard to the case? Are we here on [R118] probable cause to arrest? I don't know, your Honor. I would ask this motion be stricken and denied and would leave Counsel to file proper motion according to the rules of procedure.

THE COURT: I'm going to deny your motion, your motion to strike, your motion to dismiss. Alright.

MR. BADER: Mr. Shoup please.

RALPH ROBERT SHOUP, JR.

A Witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY M.F. BADER:

Q. Mr. Shoup, will you give us your full name and official position?

A. Ralph Robert Shoup, Jr., Detective Sargeant, Punta Gorda Police Department.

Q. In the course of your official duties did you have occasion to investigate Joseph Hayes?

A. Yes, sir, I did.

Q. As a result of your investigation did Mr. Hayes become a suspect in a series of sexual batteries?

A. Yes, sir.

THE COURT: Hold it right there, just a minute, let [R119] me get my—you may proceed, gentlemen.

Q. (Mr. Bader continuing) Who assisted you in the investigation, Mr. Shoup?

A. Numerous individuals, Investigator Gandy, Chief of Police, Assistant Chief of Police, the State Attorney.

Q. You conferred with the State Attorney in the course of your investigation?

A. That's correct.

Q. Did there come a time when you caused Mr. Joseph Hayes to be arrested?

A. Yes.

Q. When was that date, sir?

A. I don't recall the date off hand; it was the latter part of June.

Q. If I told you it was June 23rd—

A. That's correct.

Q. And, how did you procure his arrest?

A. We had gathered information and probable cause to arrest Mr. Hayes on description, location, Court order to get the documents from the Care Center where he worked.

Q. You applied to this Court for an order to secure documents from a Care Center?

A. Investigator Gandy did.

Q. You were familiar with that order and the documents?

A. Yes.

[R120] Q. At any time did you apply to this Court for a warrant for the Defendants arrest?

A. No, sir.

Q. Do you know why you didn't apply to this Court for a warrant?

A. No, sir.

Q. Have you been advised that it was necessary or unnecessary?

A. No, sir.

Q. Well, in your discussion with the State Attorney were you not instructed or did you not inquire whether or not to apply to this Court for a warrant?

A. He didn't advise that we needed a Court Order.

Q. Now, you say you had probable cause to arrest him; can you tell me now what that evidence was to arrest him?

MR. BERRY: Your Honor, I'm going to object to that. We have already had a probable cause hearing in this matter. I think it's irrelevant. I believe the Court will find a first appearance sheet.

MR. BADER: That was after his arrest.

THE COURT: Objection sustained.

Q. (Mr. Bader continuing) Mr. Shoup, was there any eye witness identification that this Defendant is the perpetrator for any of the crimes that he's been charged with?

A. Before his arrest or after?

[R121] Q. Before.

A. No, sir.

Q. Did any informant tell you they knew of their personal knowledge that he had perpetrated any of the alleged crimes?

A. Not myself.

Q. After his detention did you take his fingerprints?

A. Yes, sir.

Q. And, as a result of those fingerprints what action did you take?

A. He was placed under arrest.

Q. How did you arrange to take his fingerprints?

A. Volunteer basis on his behalf.

Q. How do you describe the circumstances where it was voluntary?

A. We asked if he would submit his fingerprints for elimination in some burglary cases and he acknowledged that he would and he did.

Q. Did you advise him that he was under suspicion of that crime at that time?

A. Yes.

Q. Did you advise him of his Miranda rights at that time?

A. No, we didn't ask him any questions concerning—

Q. Did you inform him of his Miranda rights?

[R122] A. No, sir, I didn't.

Q. Did anyone in your presence advise him of his Miranda rights at that time?

A. No.

Q. What prior arrangements had you made concerning the taking of his fingerprints?

A. I don't understand that question.

Q. You said you went to his—where did you go to get Mr. Hayes?

A. To his house.

Q. On June 23rd?

A. Right.

Q. And, at that time did you have intention to arrest him?

A. Yes.

Q. In other words, you had already formed the conclusion that he was the perpetrator of these alleged burglaries and sexual batteries?

A. I had formed a belief.

Q. And, it was your intention to arrest him that night?

A. Yes.

Q. Is it not a fact when he refused to voluntarily come with you he was informed he would be arrested if he didn't come?

[R123] A. That he could be arrested, but he came voluntarily.

Q. After he was told he could be arrested?

A. It was in the conversation, but he voluntarily came to the station.

Q. Did he initially volunteer or did he say no I don't want to go?

A. He said he would go.

Q. He would go?

A. Yes, that's correct.

Q. He said he would go?

A. Yes.

Q. Before he was told that he would be arrested?

A. Yes.

Q. You remember my previously taking your deposition?

MR. BERRY: Excuse me, your Honor, is he trying impeach his own witness? I don't understand.

MR. BADER: I'm going to object to this.

Q. (Mr. Bader continuing) Mr. Shoup, had the fingerprints not proven to match up with those previously taken at the scene what would you have done with Mr. Hayes that evening?

A. Took him home.

Q. Would you have apologized for inconveniencing him? [R124] A. I would have thanked him for voluntarily coming down and giving his fingerprints.

Q. Then you would have sent him home?

A. I would have taken him home.

Q. Did you have a set of fingerprints prior to the night of June 23rd?

A. No.

Q. Had you inquired of various Federal Agencies to see if you could obtain them?

A. Yes.

MR. BADER: I have nothing further of this witness.

CROSS EXAMINATION

BY MR. BERRY:

Q. Deputy Shoup, prior to going down and talking to Mr. Hayes did you feel you had sufficient probable cause to arrest him for a felony?

A. Yes, sir.

Q. And, you say that he did come down there voluntarily?

A. Yes, sir.

Q. And, did you take his fingerprints?

A. Yes, sir, I did.

Q. Did you match them up?

A. I gave them to Agent Kardell who made a positive identification.

Q. And, then was formally booked in the Punta Gorda [R125] Department?

A. Yes, sir.

Q. When you were at his house, when you went up there to see him the first time, did you do any search or seizure of anything inside the house or anything of any shape or form?

A. No, he came outside.

Q. Did you ask him any incriminating questions whatsoever of any kind or nature of any type?

A. No, sir.

Q. Mr. Shoup, the fingerprints we are talking about isn't the only evidence in this case, is it?

A. No, sir.

Q. There are numerous items, is that correct?

A. That's correct.

REDIRECT EXAMINATION

BY MR. BADER:

Q. Mr. Shoup, what are the numerous items?

A. Well, we conducted a photo line-up after the arrest.

Q. That was with the picture you took at the booking procedure?

A. That's while he was sitting in the lounge.

Q. That was after his detention and arrest?

A. Well, he had just been arrested.

[R126] Q. What evidence did you have prior to the time that you got the fingerprints and photographs?

A. We had a pair of tennis shoes.

Q. Did you have those before the arrest?

A. No.

Q. I want you to tell the Judge what evidence you had that you have told the State you had numerous items of evidence, what you had prior to his arrest?

A. I had made a composite from two (2) of the victims, from their description and the composite was close to the description of Mr. Hayes, which was elimination type purpose on a composite which was enough to give us enough probable cause in that particular area that he did meet and match physical description of the suspect.

Q. Mr. Shoup, are you telling this Court that the composite you got from which of the victims?

A. Both, there was two (2) victims I got composites from.

Q. Is it your testimony to this Court that the composite you got from each victim was sufficient to conclude in your mind that Joe Hayes was the perpetrator of these offenses, just on that alone?

A. This was another piece in the puzzle.

Q. You had composites, but you want to tell the Court in your mind that composite by itself was sufficient to [R127] identify Joe Hayes?

A. Not particularly Joe Hayes.

Q. But, any white male, slim, blonde hair?

A. Brown hair.

Q. One of the composites showed him with a mustache?

A. Yes.

Q. And, the other one without a mustache?

A. Yes.

Q. One with dark hair that came over his forehead?

A. That's correct.

Q. With light, hair, shoulder length?

A. That's wrong.

Q. What did it show?

A. Brown hair—no, it was not shoulder length, just below the ears.

Q. So that there was substantial differences between the composites?

A. I don't make the composite. I do the composite from what the victim—

Q. But, between the two (2) composites there was a difference?

A. Only the mustache.

Q. What other bit of evidence did you have prior to his arrest in addition to the composite?

A. From the Care Center we had documented information [R128] as to Joe Hayes' conduct and behavior with the patients that are in the Care Center. His behavior was just another piece of the puzzle.

Q. There was evidence from the Care Center that he was a rapist?

A. No.

Q. That he had been to any of these homes on the days and nights in question?

A. No.

Q. Do you recall specifically what it was that impressed you from the Care Center report that made you think Joe was the rapist?

A. His cruel treatment towards elderly patients is what impressed me about that since most of our victims were elderly age.

Q. Any other evidence?

A. I believe that is about all that I can recall at this time.

MR. BADER: I have nothing further.

RECROSS EXAMINATION

BY MR. BERRY;

Q. I have just one quick question. You work closely with Detective Gandy?

A. That's correct.

Q. Is it true that you did work out a—that it was—[R129] there were three (3) rapes involved?

A. That's correct.

Q. They were similar in nature of what you call modus operendi?

A. Yes.

Q. Was there also a pattern designed by you as to location?

A. Yes.

Q. Was there also a pattern of house numbers and was that another piece to the puzzle in regard to Mr. Hayes?

A. We believed it was. We had the first victim was 401 Shreve Street, the second victim was 401 West Retta Esplanade Avenue, the third was 140 Circle Drive.

Q. Where did Mr. Hayes slive?

A. He lived 421 Cross Street. He worked in the 400 block at the Care Center.

Q. Four hundred (400) block of the Care Center, so this was an item of evidence involved?

A. Right.

Q. Mr. Shoup, apart from the coincidence of the 400 series of numbers how did that effect, in your mind, that Joe Hayes on the three (3) nights in question went to the various addresses and commited any crimes?

A. Mr. Bader, I don't know how it is connected, but when we had found that he lived at 421 Cross Street it was [R130] just, for some reason, it did seem coincidental, but it was something you think about, that 400 series.

Q. Did you submit that information to any psychiatrist or mathematician to see if it fit?

A. No.

Q. To get any rational basis for it?

A. No.

Q. Is that all the evidence that you had prior to his arrest?

A. The only other thing was what Investigator Gandy located at the residence of Mr. Hayes before he was arrested, which was the tennis shoes.

Q. Okay, we'll let him testify about that. I have nothing further of this witness.

MR. BERRY: I have nothing further.

THE COURT: You may step down, sir.

MICHAEL W. GANDY

A witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q. Would you tell us your full name and official position please?

[R131] A. Michael W. Gandy, Investigator, Punta Gorda Police Department.

Q. In the course of your duties did you have occasion to investigate one Joseph Hayes?

A. Yes, sir.

Q. In connection with sexual batteries committed in the Punta Gorda area?

A. Yes, sir.

Q. You heard the testimony of Detective Shoup previously given in these proceedings?

A. Yes, sir.

Q. Prior to his arrest on June 23rd, you agree he was arrested on June 23rd?

A. I don't know the exact date, but if you say so.

Q. You accompanied Detective Shoup on that occasion?

A. Yes, sir.

Q. And, did you inform the Defendant that he was under suspicion of the crime of burglary?

A. Yes, sir.

Q. Did you advise him that you wanted him to come down and voluntarily give his fingerprints?

A. Yes, sir.

Q. Now, in fact you weren't investigating the burglary, but you were investigating the sexual battery?

A. I was investigating a burglary, which was prior to [R132] the battery in each case.

Q. You mean going into the house to commit the rape and made the burglary?

A. Yes, entry to commit the rape.

Q. But, each burglary was only relevant with regard to the rape that followed?

A. I don't understand the question.

Q. You separate the consequent sexual battery from the burglary and you weren't investigating the sexual battery at all this night?

A. Yes, sir, I was.

Q. You were?

A. And, the burglaries.

Q. I thought so. Alright, sir, you asked Mr. Hayes—where was he when you went to see him that night?

A. He was at his house.

Q. Did you procure a warrant?

A. Yes, sir.

Q. Had you intention of arresting him that night?

A. Yes, sir.

Q. Had you discussed the matter of procuring a warrant with your superiors or the State Attorney?

A. No.

Q. You had conferred with your superiors prior to going out there?

[133] A. Yes, sir.

Q. By pre-arrangement you had a Sheriff's Deputy to compare fingerprints?

A. Yes, sir, their expert.

Q. That was Detective Kardell?

A. Yes, sir.

Q. He was to stand by so that when you got fingerprints you could compare?

A. He was to be notified when and if Mr. Hayes was brought to the station to come down to and compare the prints. We checked to see that he would be available.

Q. You went out to his house—did you speak with Joe Hayes?

A. Yes, sir.

Q. Was Joe Hayes asked to come down and voluntarily give his prints?

A. Yes, sir.

Q. Did he accept that offer?

A. In my opinion he did, he said "No problem, I have nothing to hide" at first, when I first asked him.

Q. That's true, that's what he said, "I haven't done anything. I have nothing to hide." and what was said after that?

A. By—

Q. Do you recall previously testifying that you said, [134] "Joe, how about if we arrest you for burglary?" or "We are going to arrest you" and then Joe said, "No, don't do that, I would rather come down and give fingerprints."?

A. I did not advise him that I would arrest him, that was Investigator Shoup, I don't recall the words. This was after bits of conversation, I don't recall the exact content of the information, which Joe had started to back pedal is a good word, out of coming down to the station, and then Investigator Shoup or Detective Sgt. Shoup advised him that again something "How about if we arrest you?" or "We will

then arrest you". Joe then blurted out "No, no, I don't want to do that. I will come voluntarily."

Q. Okay, you heard Detective Shoup testify that he never made that statement?

A. Which statement?

Q. That he told Joe, when Joe started back pedaling, that if you don't come we'll arrest you?

A. No, I didn't hear him say that.

Q. You did hear Investigator Shoup tell him "If you don't come we'll arrest you"?

A. He didn't say it that way. He didn't tell Joe—he made the statement, something to the effect he would be arested or that he was going to be arrested, but he didn't threaten and say it in a threatening manner to make him come to the station.

[R135] Q. Alright, Mr. Gandy, other than the investigation following his arrest, what evidence did you have substantiating Joe Hayes identity as the perpetrator on three (3) sexual batteries?

A. Prior to his arrest?

Q. Yes, prior.

A. Joe Hayes, we had done, myself and Detective Shoup, had done numerous fingerprint checks with different subjects that Officers and us run into. I was called at my house while I was at home—

Q. Let me slow you down a minute. Did any of the victims identify Joe Hayes?

A. I was told they did, yes, sir.

Q. Prior to his arrest?

A. Not prior to his arrest.

Q. I'm speaking of only prior to his arrest?

A. Not that I know of.

Q. Did any informant tell you that he had seen Joe Hayes leaving any of the victims premises on the night in question?

A. No, sir.

Q. Was it necessary for you to tie up his fingerprints to the latent you got at the scene in order to satisfy you that he was indeed the perpetrator of these offenses?

A. Not to satisfy me, no, sir.

[R136] Q. Well, you are saying that you had sufficient evidence before you got the fingerprints to cause his arrest for these crimes, all three (3) of them?

A. Yes, sir, to satisfy me. I didn't say all three (3) at the time.

Q. What evidence did you have? I assume you had the same evidence that Mr. Shoup had?

A. Yes, sir.

Q. Four (4) street numbers?

A. Yes, sir, all victims were assaulted from the rear. I spoke with a friend.

Q. Assuming that is true—

MR. BERRY: Excuse me, I would ask that he be allowed to answer.

THE COURT: Allow him to answer.

A. Would you ask me again?

Q. (Mr. Bader continuing) Assuming all the victims had been attacked from the rear, how did that connect with Joe Hayes prior to his arrest or even afterwards?

A. He had a friend or girlfriend he was dating that he had tried to have sexual intercourse, according to her, from the rear, on many occasions.

Q. This was a sworn statement you got from somebody?

A. No, sir, an interview.

Q. And, this girl you knew?

[137] A. I didn't know personally, no, sir.

Q. I see, and that circumstance was sufficient to identify Joe Hayes as the perpetrator?

A. No, sir, not that one alone.

Q. What other circumstances did you have?

A. Again, the same as Detective Sgt. related with the 400 series and it was his bazaar behavior described by the Care Center, his apparent dislike of older female employees with the Care Center. His apparent, as described by one of the Care Center employees, his apparent dislike or his apparent fear of younger women. She had described this to me, one of the employees had. The fact that I saw a pair of herring bone design tennis shoes on his porch and that at the rape scenes there was a pair of herring bone shoe prints in all the cases. The fact that—

Q. Let's stop there a minute. These herring bone design tennis shoes, are they unique in any way?

A. No, there's a lot of them out.

Q. How many would you guess?

A. I have no idea.

Q. Hundreds?

A. I would imagine.

Q. So, there was nothing about herring bone tennis shoes that would necessarily connect Joe Hayes as the perpetrator of the particular night in question of these [R138] offenses?

A. Just the fact that he had a pair and that was the type of print we found at each scene.

Q. Mr. Gandy, are we talking about a suspicion, putting all these things together you had formed a suspicion he might be the perpetrator?

A. It was at first when it first started, but at the end I was convinced.

Q. That was after you got the fingerprints?

A. Before.

Q. Did it ever occur to you then, if you were convinced, to bring that before the Judge and ask for an arrest warrant?

A. No, sir.

Q. Did you have any reason to believe Joe Hayes was leaving town?

A. No, sir.

Q. Are you familiar with the requirement to seek from the Court a warrant for arrest when you believe there has been a crime committed by a citizen, do you know about that procedure?

A. Which one?

Q. To come before a Judge and ask him to issue a warrant to arrest somebody?

A. If I had probable cause I can make the arrest without [R139] a warrant.

Q. I see, but do you know about the procedure about coming before a Judge even with—

A. Do I know how to do it?

Q. Yes.

A. Yes.

Q. Do you know why you didn't do it in this case?

A. No, sir.

Q. Have you had a chance to know why you didn't come?

A. No, sir.

MR. BADER: I have nothing further of this witness.

MR. BERRY: No questions.

THE COURT: You may step down.

(Witness excused)

MR. BADER: Judge, I have a litany of Florida and Supreme Court Case ruling to suppress the evidence and the requirement is to obtain from the Courts a warrant before arrest. I would not burden the Court with the complete recitation of them. There are a few Florida cases that I think are important that I would like to call to the Court's attention.

One is Supreme Court Florida decision, Anderson vs. State, which is cited, your Honor, 241 So.2d

THE COURT: You got copies of it?

[R140] MR. BADER: I sure do. The pertinent paragraph is at headnote 7, your Honor.

THE COURT: 241 So.2d, 390?

MR. BADER: Headnote paragraph 7 is the one that cites with approval the authority that I will ultimately get to.

THE COURT: Okay.

MR. BADER: I would cite, your Honor, Shepherd vs. State at 343, So.2d, page 1390. Here the First District Court of Florida states that a warrantless search must be based on probable cause and on sufficient circumstances to excuse the failure to obtain a warrant. I have marked the pertinent parts of the decision for your Honor's review.

THE COURT: Wait just one second.

(off the record)

THE COURT: I might point out where I went. I got a copy, which you furnished me of Anderson vs. State.

MR. BADER: That's the only paragraph, Judge.

THE COURT: But, it doesn't include everything in the case. There are other parts that go into that case.

MR. BADER: Well, that's the only part—

THE COURT: Yes, sir, but I like to look. I want to know what circumstances it is, what and why. Why not just bring me the one paragraph?

MR. BADER: When I finish my argument it will be [R141] connected. I could have brought only the part the Supreme Court of Florida recognized, the doctrine of Davis vs. Mississippi case and it has been upheld and cited with approval by other Florida Courts and then I'll get to the Kensler vs. Florida, your Honor, 360, Southern Reporter at page 24. The Second District, which is our Appelate Division cites with approval and dismisses and reverses a conviction based upon fingerprints taken by the Police where they were taken before he was arrested and without probable cause, violating his First Amendment protection and cites again Davis vs. Mississippi and the Anderson case.

That's all I'm doing, is what they get down to say is what the Supreme Court said in the Davis vs. Mississippi case, which I cite to your Honor as being 394, United States 721, a decision in which the Supreme Court of Mississippi confirming a conviction based on fingerprints taken from a negro male, rape of an older woman, were suppressed. The conviction was reversed and the fingerprints suppressed by the Supreme Court. It is this decision that Anderson acknowledged, the Supreme Court of Florida, in which this District Court of Appeals cites with approval in the Kensler case. That was the only reason I cited Anderson and Kensler.

It is the Davis case, that is the pertinent one, Judge. I would also cite to you the decision of the Fourth District, [R142] State of Florida vs. Hinton, 305, Southern Reporter page 804, which states that in a warrantless search the burden, once the fact the search was warrantless, shifts to the State and the Defendant need do nothing more but assert the warrantlessness of the search. And, in that case neither the State nor the Defendant put on any testimony, but merely referred to the Court file, which failed to disclose that a warrant had been obtained. In the absence of having

obtained a warrant the Court said that the burden shifts to the State to prove that the arrest or search were valid and that the evidence, not having done so, the motion was granted.

I give that to you, your Honor,

Again, in the First District Court, cited Shepherd vs. State, 343, So.2d, 1349, warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. And, in that case the Court, speaking very specifically to the kind of facts we have in this case, the burden rests on the State to demonstrate that the warrantless search of the person—that a warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. Even if the Officer had probable cause to believe evidence of a crime was contained in the billfold, this was a search of a billfold, [R143] and there was no exigent circumstances to excuse the Officer for applying for a search warrant. Even if it was sufficient to justify, if the evidence was sufficient to justify the issuance of a warrant, nothing excused the Officer from the requirement of waiting to conduct the search until the warrant issued.

So that what the Courts have consistently, from our Florida Court to the Supreme Court, as that if the State in the development of it's investigation developes sufficient evidence to warrant the arrest of the Defendant, it must apply first to the Court where an objective, impartial Officer will have an opportunity to review the evidence and put his judicial approval on the act of the Police, otherwise the Fourth Amendment becomes meaningless, if each Officer can make up his own mind as to what is probable cause, then we don't need warrants, we don't need Chapter 301 or the Fourth Amendment, because every Officer will decide that he has got probable cause. The test is whether an impartial judicial officer would agree with them. And, here I think the evidence clearly shows that they had a lot of suspicions, but they needed those fingerprints, but they went to Joe's house and had the intent as their deposition shows, which are on file in this record, they were going to arrest him that night one way or the other for these crimes with-

out ever coming before you, in violation [R144] of Four (4), Six (6), and Fourteenth (14) Amendment to the Constitution as more fully set forth in the Davis case.

THE COURT: What say the State?

MR. BERRY: I believe the facts presented before the Court sufficiently show the Officers had probable cause for the Defendant prior to the taking of fingerprints. I think that, further, the evidence before this Court is what he did, voluntarily go down there, they took his fingerprints and arrested him, there was no total facts before the Court. There was absolutely no search of any dwelling involved. They said they didn't even go in. What we are talking about is probable cause to arrest on a felony. The law of Florida clearly states if an Office had probable cause to arrest on a felony he has that authority. I think they properly exercised their authority. They did not secure a search warrant. They weren't searching any building or personal effects. I think that the motion as filed before the Court should be denied.

THE COURT: Alright, on the basis of the testimony before the Court the motion incorporated all portions thereof is denied. So be it. (Hearing concluded)

EDITOR'S NOTE

PAGES 27 thru 31 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT, TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, FLORIDA

DIVISION CIRCUIT-FELONY

CASE NUMBER 80-156-CF-A-RMS

STATE OF FLORIDA

-vs-

JOE HAYES
Defendant

JUDGMENT

The Defendant, JOE HAYES, being personally before this Court represented by ROBERT "BOB" BADER, COURT APPOINTED, his attorney of record, and having:

(Check if Applicable)
- [X] Been tried and found guilty of the following crime(s)
- [ ] Entered a plea of guilty of the following crime(s)
- [ ] Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
3	BURGLARY OF DWELLING	810.02(2)(1)(2)(a)	LIFE	80-156-CF-A-
4	SEXUAL BATTERY	794.011(5)	SECOND	80-156-CF-A-

Cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

(Check if Applicable)
- [ ] The Defendant is further ordered to pay an additional two ($2.00) pursuant F.S. 943.25(8) (This provision is optional; not applicable unless checked).
- [ ] The Court hereby imposes a fine in the sum of $_____

NOTE: *This page is to be completed ONLY where sentence is stayed and withheld or deferred until a later date.*

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence and places the defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order).

Sentence Deferred *(Check if Applicable)*

☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant[s entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin of indigency.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

_____
Name and Title

DONE AND ORDERED in Open Court at _____ County, Florida, this _____ day of _____ A.D., 19____. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, _____ and that they were placed thereon by said Defendant in my presence in Open Court this date.

_____
JUDGE

Defendant JOE HAYES

Case Number 80-156-CF-A-PMS

SENTENCE

(As to Count)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown,

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

XXXX The Department of Corrections of the State of Florida, or

☐ The Sheriff* of _____ County, Florida

*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

XXXX For a term of NINETY NINE (99) YEARS

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

XXX The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of 33 years. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

XXX It is further ordered that the Defendant shall be allowed a total of 467 credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HAYES

Case Number 80-156-CR-A-PMS

SENTENCE

(As to Count II)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown.

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

☐ The Department of Corrections of the State of Florida, or
☐ The Sheriff* of _____ County, Florida
*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one, unmarked sections are inapplicable)

☐ For a term of Natural Life
☐ For a term of _____
☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

☐ It is further ordered that the Defendant shall be allowed a total of _____ credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HAYES

Case Number 80-156-CF-A-RMS

(Concurrent/Consecutive as to other convictions)

☐ It is further ordered that the composite term of all sentences imposed for the counts specified in this Order shall run ☐ consecutive or ☐ concurrent (check one) to any active sentence currently being served by the Defendant

In the event the above sentence is to the Department of Corrections, the Sheriff of CHARLOTTE County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgement and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin of indigency.

In imposing the above sentence, the Court further recommends (SEE ATTACHED ORDER)

FINGERPRINTS OF DEFENDANT

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	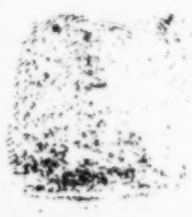		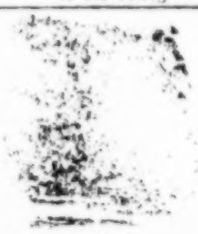	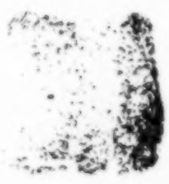
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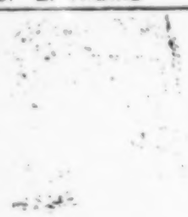	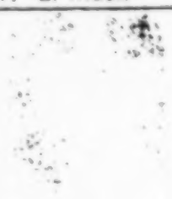			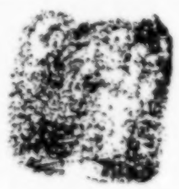

Fingerprints taken by:

LT. JOHN DAVENPORT: CHIEF JAILER-CCSO
Name and Title

DONE AND ORDERED in Open Court at CHARLOTTE County, Florida, this 5th day of OCTOBER, A.D., 19 81. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, JOE HAYES and that they were placed thereon by said Defendant in my presence in Open Court this date.

James R. Adams
CIRCUIT JUDGE
HONORABLE JAMES R. ADAMS

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 82-436

JOE HAYES, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE.

Opinion filed September 16, 1983.

Appeal from the Circuit Court for Charlotte County;
James R. Adams, Judge.

Jerry Hill, Public Defender,
and Michael E. Raiden, Assistant Public Defender,
Bartow, for Appellant.

Jim Smith, Attorney General, Tallahassee,
and William I. Munsey, Jr., Assistant Attorney General,
Tampa, for Appellee.

CAMPBELL, *Acting Chief Judge.*

Joe Hayes appeals his convictions for burglary and sexual battery. He challenges the admission into evidence at his trial of fingerprints taken from him during a police investigation and of tennis shoes removed from the front porch of his home during the course of that same investigation. We find no error, and we affirm.

Early on the morning of May 13, 1980, a man entered the victim's home and raped her. When the man left, she called the police, and when the officers arrived, they found latent fingerprints on the doorknob of the victim's bedroom door.

The police also found a herringbone pattern tennis shoe print on the east side of the victim's front porch.

The police continued investigating this case for the next several weeks, and with the help of the victim, they prepared a composite drawing of the assailant that yielded the following description: A slender, white male with short brown hair. The police officers conducted field interviews with thirty to forty men who generally fit that description. One of the men interviewed was appellant.

Gradually, appellant emerged as a possible suspect in this and several other sexual battery cases, and so Detectives Shoup and Brady, along with the assistant police chief of Punta Gorda, went to appellant's home to obtain his fingerprints. They intended to compare these prints with the latent prints lifted from the victim's home. A search warrant was not obtained prior to going to appellant's home.

Detective Shoup later testified that they only wanted to obtain appellant's fingerprints, but he added that they were prepared to arrest appellant if he refused to cooperate because they believed they already had sufficient probable cause to do so. The officers never entered appellant's home but talked to him on his front porch. He said he would rather go with the officers to the station than be arrested. It is, therefore, at best, highly questionable that appellant's accompanying the officers to the station could be considered voluntary. While the officers stood on the front porch, they also noticed a pair of herringbone pattern tennis shoes lying on the front porch.

Appellant went to the station with the officers and allowed them to take his fingerprints. When the police compared these prints with the latent prints removed from the crime scene, they found that the prints matched, and appellant was thereafter arrested for and later charged with burglary and sexual battery.

Appellant sought, both before and during trial, to suppress the fingerprints and tennis shoes seized during the police investigation. The trial judge refused to suppress these articles of evidence, and the jury eventually found appellant guilty as charged.

Initially, we note that even though the officers did not have a warrant, *Payton* v. *New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not apply here since the discussion about fingerprints and the seizure of the tennis shoes occurred on the front porch of appellant's home. Because the officers found the shoes on appellant's front porch, the trial court did not err in admitting the shoes into evidence. *State* v. *Rickard*, 420 So.2d 303 (Fla. 1982), demonstrates that these shoes clearly were not in a constitutionally protected area at the time the officers saw them and so were subject to seizure.

We move then to a consideration of the stop of appellant and the seizure of his fingerprints, and we begin and end with an examination of the fourth amendment. Generally, to be valid under the fourth amendment, a search and seizure should be made only pursuant to a warrant that is based upon probable cause. In fact, a warrantless search is per se invalid unless it falls within one of the carefully defined exceptions to the warrant requirement. *Engle* v. *State*, 392 So.2d 245 (Fla. 5th DCA 1980); *Ulesky* v. *State*, 379 So.2d 121 (Fla. 5th DCA 1979).

However, law enforcement officials frequently make a determination of probable cause, based upon the facts before them, that is later judicially sustained. Here, the police officers believed they had probable cause sufficient to arrest appellant before they obtained his fingerprints. However, we conclude that the officers did not have probable cause at that point in the investigation. The officers were seeking an intended, investigatory confrontation, an encounter in which law enforcement officials frequently engage. Such confrontations may occur in the context of preventing a crime from occurring, or, as here, where officers are involved in an ongoing investigation in an effort to solve a particular crime. At the time the officers approached appellant's home, they had only the partial description given in the composite drawing to guide them and the knowledge that appellant was evidently a suspect in some other sexual batteries. These factors were alone insufficient to give the officers probable cause to arrest appellant. Since they did not have probable cause to arrest appellant, we must deter-

mine whether appellant's encounter with the police may be lawfully explained in another manner. To answer this question, we still must examine the fourth amendment because clearly the strictures of that amendment apply during the investigatory as well as the accusatory or arrest stage of the criminal process. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). However, to resolve this issue, we must examine that amendment from another perspective.

Not all searches and seizures are invalid simply because probable cause is lacking. In *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court upheld a policeman's stop and frisk of a person whom he suspected of being involved in criminal activity. In reaching its conclusion, the Court set out a very limited context in which the probable cause requirement of the fourth amendment does not apply. The focus for the Court in *Terry* and the focus which we follow here is whether the official governmental intrusion was reasonable. This focus is dictated by the very language of the amendment because it is beyond peradventure that the fouth amendment protects citizens from *un*reasonable searches and seizures, not *all* searches and seizues. *Terry; Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1467, 4 L.Ed.2d 1669 (1960); *Gaskins* v. *State*, 89 So.2d 867 (Fla. 1956); *State* v. *White*, 312 So.2d 475 (Fla. 4th DCA 1975); *Gilbert* v. *State*, 289 So.2d 475 (Fla. 1st DCA), *cert. denied*, 294 So.2d 660 (Fla. 1974); *Welester* v. *State*, 201 So.2d 789 (Fla. 4th DCA 1967). And when the probable cause requirement of the fourth amendment is not implicated in the facts of a particular case, courts must then examine all the attendant facts and circumstances involved to determine whether that governmental intrusion was reasonable for fourth amendment purposes. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Longo* v. *State*, 157 Fla. 668, 26 So.2d 818 (1946); *Starks* v. *State*, 108 So.2d 788 (Fla.2d DCA 1959). In undertaking this examination, a court must compare and then balance the competing interests involved. *Brignoni-Ponce; Terry; Camara* v. *Munici-*

pal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

The public, and through it the police, has an understandably strong interest in effective detection and prevention of crime. As the Court stated in *Terry*, "it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an approprite manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause of arrest." 392 U.S. at 22, 88 S.Ct. at ____, 20 L.Ed.2d at 906. This legitimate interest must be balanced in turn with the individual's interest in being free from unjustified, humiliating physical intrusions as well as against his overall interest in privacy. In making this inquiry under the fourth amendment, courts must be cognizant that the analysis must proceed at two different levels. First, there must be a seizure of the individual by law enforcement officials. Then, there must be a search for and a seizure of evidence. *United States* v. *Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

Appellant clearly was seized for purposes of the fourth amendment when the officers accosted him on his front porch and asked for his fingerprints. Because this was the sole reason for this intended investigative confrontation and because no interrogation occurred, we conclude that under the narrow circumstances of this case, this was a reasonable seizure or detention of appellant under the fourth amendment.

It does not matter that the officers had to take appellant to the police station to actually obtain his prints. Whether the prints were taken at the station or on appellant's front porch is immaterial. *State* v. *Merklein*, 388 So.2d 218 (Fla. 2d DCA 1980), *petition for review denied*, 372 So.2d 1377 (Fla. 1981), illustrates why this is so. There, sheriff's deputies were responding to an attempted robbery that occurred on Siesta Key. One deputy broadcast a BOLO describing the getaway car and the two suspects inside. Other deputies covered the bridges leading to the mainland and stopped several vehicles that fit the description in the BOLO. The defendant and his companion were stopped,

and then they were held until another deputy could transport the victim and the witnesses to the scene for purposes of identification. This court found that this was a reasonable detention. "It is permissible to detain suspects for a reasonable time to investigate the circumstances warranting an investigatory stop as well as any suspicious circumstances produced by the stop." 388 So.2d at 219.

Like the detention in *Merklein*, the detention here occurred during the investigatory stage of the criminal process. In these circumstances, it does not matter who is moved, the victim or the suspect. By way of analogy and in support of the view we follow here, it should be noted that in *Pardo* v. *State*, No. 82-52 (Fla. 5th DCA Apr. 20, 1983), the defendant was removed from the scene of an accident, taken to a hospital, and there had a blood specimen taken from him. The specimen was later used against him in his trial for manslaughter while driving intoxicated. The movement to the hospital prior to taking the blood specimen did not render the specimen inadmissible at trial. Where there is a reasonable suspicion sufficient to justify a stop or detention, it is permissible to stop or detain an individual reasonably long enough to allay or confirm suspicions so as to cause either release or arest of that individual. This principle applies here because if it is reasonable to take a suspect to a hospital for a blood test to obtain evidence in regard to a manslaughter charge, it seems to us it is also reasonable to take a suspect in a rape case to the police station to obtain fingerprint comparisons.

Since we conclude that appellant was lawfully detained, or seized for purposes of the fourth amendment, we move to the next level to determine whether the taking of appellant's fingerprints was likewise a reasonable search and seizure under the fourth amendment.

In *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the United States Supreme Court held that fingerprints obtained from the petitioner in that case had been seized during a detention violative of the fourth and fourteenth amendments. The petitioner was one of twenty-four black youths taken to police headquarters during an investigation in a rape case. The victim had de-

scribed her assailant only as a young black male. During the detention, the youths, including the petitioner, were fingerprinted, *questioned*, and released. The petitioner was detained again a few days later, jailed, given a lie detector test, and fingerprinted again. The Court reversed, noting that there had been "no attempt ... to employ procedures which might comply with the requirements of the Fourth Amendment." 394 U.S. at 728, 89 S.Ct. at ____, 22 L.Ed.2d at 681. Although not necessary to the decision in *Davis*, the Court addressed the question of a detention *solely* for the purpose of obtaining fingerprints:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara* v. *Municipal Court*, 387 US 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
>
> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed proce-

> dures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.

394 U.S. at 727-28, 89 S.Ct. at ____, 22 L.Ed.2d at 681. The Court in *Davis* did not need to decide that question because, under the facts of that case, it was unnecessary to do so. The Court ruled that the fingerprint evidence was inadmissible explicitly because the police officers *interrogated* the petitioner in addition to merely taking his fingerprints.

The instant case poses the very question left unanswered by the Court in *Davis*, and we note that this issue has not been directly addressed since the *Davis* decision. *See United States* v. *Thomann*, 609 F.2d 560 (1st Cir. 1979). Our study of *Davis* and its progeny has revealed that the precise holding of *Davis*, which we have just described, as well as the meaning and import of that decision, has been misconstrued. *See Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971). *See also Hamrick* v. *Wainwright*, 465 F.2d 940 (5th Cir. 1972). For example, in *Dunaway* v. *New York*, the Court, while again asserting the notion that it is permissible under certain circumstances to take fingerprints absent probable cause, seemed to imply in an earlier paragraph of the same opinion that it had rejected that very argument in *Davis*.

Of course, the Court did not reject that argument in *Davis*, and in any event, the facts in *Dunaway* in no way involved or concerned the taking of a suspect's fingerprints during the course of an ongoing criminal investigation. There, the police, during the course of a murder investigation, took the petitioner to the station, placed him in an interrogation room, gave him *Miranda*[1] warnings, and questioned him. He was never told he was under arrest, and the officers did not obtain a warrant because they did not believe they had probable cause. Eventually, he made an incriminating statement which was later determined to be the fruit of an illegal detention. Thus, *Dunaway* is inapposite to the instant case, except insofar as it stands for the

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[1] *Miranda* v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

proposition we earlier stated; the fourth amendment applies to the investigatory as well as the accusatory stage of the criminal process.

Our state courts have also touched on the issue before us on occasion; however, each case is factually distinguishable and, therefore, inapplicable to the instant case. In *Anderson* v. *State*, 241 So.2d 390 (Fla. 1970), *vacated*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972),[2] the defendant ws arrested and fingerprinted and later obtained counsel. Later, the police took his palmprint without advising him of his rights. The court held that this action did not violate the defendant's right to be free from self-incrimination. Citing *Davis*, and apparently misconstruing it, the court in dicta indicated that taking the fingerprints of a suspect before arrest and without probable cause was violative of the fourth amendment. However, as we have indicated, *Davis*, in fact, left open that precise question, and so the language in *Anderson*, being dicta by which we are not bound, does not prevent us from reaching and deciding that question. Years ago, Mr. Justice Whitfield explained why this is so:

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from

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[2] The case was vacated "insofar as it leaves undisturbed the death penalty imposed. . . ." 408 U.S. at 845, 92 S.Ct. at 2845, 33 L.Ed.2d at 744. *See Stewart* v. *Massachusetts*, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972).

> its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arise as to the effect of a decision will be practically avoided.
>
> What is said in an opinion upon a point not raised or properly involved cannot control in a subsequent case whee the very point is presented for decision. *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 39 Sup.Ct.Rep. 276. General words used in a judicial opinion should be construed with such limitation as are required by a refernce (sic) to the facts in the case.

Ex Parte: Ernest Amos, 93 Fla. 5, 20-22, 112 So. 289, 294-95 (1927) (en banc) (Whitfield, J., concurring) (citations omitted). This old and well established judicial principle is still valid and has been consistently applied. *Ard* v. *Ard*, 395 So.2d 586 (Fla. 1st DCA 1981); *Bunn* v. *Bunn*, 311 So.2d 387 (Fla. 4th DCA 1975); *Weisenberg* v. *Carlton*, 233 So.2d 659 (Fla. 2d DCA), *cert. denied*, 240 So.2d 643 (Fla. 1970); *Booth* v. *Mary Carter Paint Co.*, 182 So.2d 292 (Fla. 2d DCA 1966).

In *Kinsler* v. *State*, 360 So.2d 24 (Fla. 2d DCA 1978), the defendant allowed police officers to take a footprint impression from him, and this court, relying on *Davis* and the *Anderson* dicta, found that this action violated the defendant's fourth amendment rights. However, there, a key factor for the court was the defendant's status as a parolee and his parole officer's statement that if he refused to submit he would be in violation of his parole. Notwithstanding, to the extent that *Kinsler* followed the dicta in *Anderson* which sprang from an erroneous application of *Davis*, we hereby recede from that portion of our *Kinsler* decision.

There are a number of cases that address situations similar to the one presented here, and having examined these

cases, we conclude that the fingerprints were properly seized and, therefore, properly admitted into evidence against appellant.

In *United States* v. *McCarthy*, 297 F.2d 183 (7th Cir. 1961), *cert. denied*, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962), the court affirmed McCarthy's bank robbery conviction. He argued that prints taken from him by an F.B.I. agent who persuaded him to go downtown and give his prints should be suppressed because they had been seized in violation of the fourth amendment. The court, in affirming, held otherwise, and this case seems to represent the clearest example of the situation left open in *Davis*, aside from the one presented here. Cases decided after *Davis* that have touched on this issue and similar ones dealing with physical evidence have also allowed such evidence to be admitted.

In *United States* v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. denied*, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 88 (1973), the court affirmed the admission into evidence of palmprints taken from Sanders. The court noted that at the time the palmprints were taken, Sanders was lawfully in custody on another unrelated matter. Appellant was likewise lawfully seized. As far as the actual taking of the palmprints, the court concluded that taking palmprints, like the taking of fingerprints here, is much less intrusive than an interrogation or a full-blown search of the person.

In *United States* v. *Harris*, 453 F.2d 1317 (8th Cir. 1972), *cert. denied*, 412 U.S. 927, 93 S.Ct. 2755, 37 L.Ed.2d 154 (1973), the court found no error in the admission of handwriting exemplars given by the defendant. The defendant there was a suspect in a case involving the theft of a check which he had endorsed. Some postal inspectors visited Harris in his home and in the presence of his parents informed him of the ongoing investigation and asked him for his handwriting sample. The court found that the postal inspectors' conduct was reasonable because Harris was never under any type of pressure, coercion or duress. The court stated with reference to the inspectors' conduct that "it appears to be the most logical and reasonable course of conduct to pursue." 453 F.2d at 1321. Likewise

here, the officers, in attempting to solve a serious crime, tried to tie up the strongest lead they had, fingerprints, with a suspect.

In *United States* v. *Seacrest*, 640 F.2d 81 (7th Cir. 1981), the court affirmed the earlier denial of Seacrest's motion to suppress his fingerprint evidence. The court noted that like the defendant in *Sanders*, Seacrest was lawfully in custody on another matter at the time his fingerprints were taken. Since he was, therefore, lawfully seized for fourth amendment purposes, like appellant here, the court examined only the taking of the fingerprints from Seacrest and concluded that the process was so minimally intrusive that it was wholly reliable and, therefore, did not violate the fourth amendment.

Therefore, it is clear from *McCarthy*, *Harris*, *Sanders* and *Seacrest* that such a minimal intrusion upon appellant in this case did not infringe any of his fourth amendment rights. Though he was not in legal *custody*, he was lawfully and reasonably "seized" for purposes of the fourth amendment. This seems to us a logical extension of *Terry*. Unlike the petitioner in *Davis*, there is no evidence that he was subjected to interrogation.

Finally, we note that in *McCarthy*, *Harris* and *Sanders*, the courts did not require that there be judicial approval or authorization prior to obtaining prints or handwriting samples. Neither do we conclude that there should be such intervention for we do not deal here with a question of probable cause. Requiring this type of judicial intervention at this stage of a criminal investigation would unnecessarily hamper efforts both to prevent and to solve crimes. Carried to its logical extreme, such a rule would render *Terry* a complete nullity.

It would appeal by implication from *Davis* and many other cases that had the officers arrested appellant under a mistaken belief that they had probable cause, taken him to the station, booked him, fingerprinted him, and nothing more, the fingerprints would be admissible in evidence even though the arrest was later invalidated. Thus, it would seem that where, as here, appellant was not arrested, there was no probable cause but only a reasonable

suspicion of criminal activity, and where appellant was, without force being used, persuaded or even coerced into going with the officers and giving his fingerprints, and nothing more, those prints would also be admissible.

However, this decision should not in any way be construed as giving law enforcement officers carte blanche to fingerprint every person suspected of committing a crime currently under investigation. We hold only that under the narrow facts of this case, the government's legitimate interest in law enforcement, specifically, the solving of a violent crime, outweighed appellant's interest in privacy as defined by the fourth amendment.[3] The initial seizure of appellant was reasonable as was the seizure of his fingerprints. As we have earlier stated, the seizure of the tennis shoes presents no fourth amendment problems.

We have examined the remaining points on appeal, and we find them to be without merit.

AFFIRMED.

SCHOONOVER and LEHAN, JJ., Concur.

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[3] Although we have not discussed it, obviously the fourth amendment is made applicable to the states by operation of the fourteenth amendment.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

NOVEMBER 2, 1983

Case No. 82-436

JOE HAYES, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE.

Counsel for appellant having filed a motion for rehearing, rehearing en banc, and/or certification of question in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED that appellee's motion to strike is denied.

A TRUE COPY
TEST:

/s/ William A. Hoddad
WILLIAM A. HADDAD
Clerk District Court of Appeal
Second District

SUPREME COURT OF FLORIDA

THURSDAY, MARCH 22, 1984

Case No. 64,502
District Court of Appeal,
2d District—No. 82-436

JOE HAYES, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., BOYD, MCDONALD and EHRLICH, JJ., Concur.

ADKINS, OVERTON and SHAW, JJ., Dissent

A True Copy
TEST:

cc: Hon. William A. Haddad, Clerk
Hon. Buddy Clark Alexander, Clerk
Hon. James R. Adams, Judge
Michael E. Raiden, Esquire
William I. Munsey, Jr., Esquire

Sid J. White
Clerk Supreme Court.

By: _____
Deputy Clerk

Supreme Court of the United States

No. 83-6766

JOE HAYES, PETITIONER,

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO the District Court of Appeal of Florida, Second District.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 1, 1984